Supreme Court, U.S.
FILED

02 234 AUG 13 2002

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

MILAN CHEYOVICH; DIANA CHEYOVICH, individually and as Court Appointed Guardian for Daniel Milan Lucien Cheyovich Joye and Nicolas Marc David Cheyovich Joye, minors,

Petitioners,

v.

SAN MARINO SCHOOL DISTRICT; JOHN BEUGELMAN, a.k.a. Jacques Beuglemans, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DIANA CHEYOVICH
MILAN CHEYOVICH
1858 South Euclid Avenue
San Marino, California 91108
(626) 799-4193

41PP

QUESTIONS PRESENTED FOR REVIEW

1. Are elderly grandparents,[1] who obtained legal and physical custody of their deceased daughter's two minor sons, both American and California citizens, living then with the grandparents in California, entitled to bring federal claims under the Federal Civil Rights Act, 42 U.S.C. sections 1983, 1985(2), 1985(3), 1986 and 1988, for their grandsons being kidnapped from their public schools, whose principals, administrators and teachers knew of their legal guardianship status, copies of such having been served them and their being warned of the possible kidnapping of their grandsons by their French citizen father, which school officials engineered, conspired with, planned and accomplished such kidnapping with the father, his private California attorney, and all of whom were further joined in such conspiracy of a cover-up, obstruction of justice, complicity, acts of perjury, falsification and manufacture of evidence, etc., with and by the grandparents first retained trial counsel, and the school district's own private and trial counsel, resulting in ongoing violations of the Hague Convention Treaty, numerous criminal statutes of the United States and California, plus preventing frustration and destroying familial relationship, direct contacts, visits, legal and private communication with their grandsons and the perfection of their and their grandsons' legal rights and claims, the grandparents also

---

[1] Their ages being 78 & 70 when grandsons kidnapped; now 88 & 80.

QUESTIONS PRESENTED FOR REVIEW – Continued

being guardians ad litem in two state court actions and their federal court action?

2. Is a California Appeal Court's "NOT TO BE PUBLISHED DECISION," upholding a trial judge's reversal of a jury's judgment on only a negligence claim in favor of the grandparents for $1,400,000.00, to be given claim or issue preclusion per a Rule 12(b)(6) dismissal motion when not all named parties in the federal action were named in the state action, no federal claim issues nor conspiracies, etc., were tried in the state action, the federal action was abated until after the state court decision, and no procedural/substantive rights of due process or equal protection were accorded the grandparents via the judicial notice requested of the nonpublic appellate decision?

3. Do the California Statute of Limitations doctrines of (a) discovery of conspiracy facts and (b) the last overt act doctrine, suspend or toll such statute running while such conspiracies are ongoing/continuing?

LIST OF PARTIES

PETITIONERS:

1. MILAN CHEYOVICH – In Pro se	MILAN CHEYOVICH 1858 South Euclid Ave. San Marino, CA 91108 Phone: (626) 799-4193
2. DIANA CHEYOVICH – In Pro se	DIANA CHEYOVICH 1858 S. Euclid Ave. San Marino, CA 91108 Phone: (626) 799-4193

RESPONDENTS:

1. JACQUES BEUGELMANS	LAW OFFICE OF RICHARD COMESS 944 Princeton Dr. Marina Del Rey, CA 90292 Richard D. Comess, Esq. Phone: (310) 745-2260
2. SAN MARINO SCHOOL DISTRICT & Employees and attorneys JUDITH ANDERSON, Esq. and J. MICHAEL DECLUES, Esq.	(WALSH & DECLUES) now DECLUES & BURKETT Six Hutton Centre Dr. Ste 1050 P.O. Box 22021 Santa Ana, CA 92702-2011 Phone: (714) 436-1776
3. JAMES A. SHALVOY	JEFFREY A. EVANS, Esq. SEDGWICK, DETERT, MORAN & ARNOLD 801 S. Figueroa St., 18th Floor Los Angeles, CA 90017-5556 Phone: (213) 426-6900

LIST OF PARTIES – Continued

4.	BIGELOW, MOORE AND TYRE	ROBERT C. JENKINS, Esq. MANNING & MARDER 660 S. Figueroa St. # 2300 FIRST INTERSTATE TOWER Los Angeles, CA 90017 Phone: (626) 624-6900
5.	JACKY BERNARD JOYE – In Pro Per	JACKY BERNARD JOYE Le Haut Sers 32600 L'isle Jourdain France

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	iii
TABLE OF CONTENTS	v
TABLE OF AUTHORITIES	vii
CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS	1
STATEMENT OF BASIS OF JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN PETITION	2
STATEMENT OF THE CASE	2
ARGUMENT	6
1. PETITIONERS HAD PROPERLY AVERRED VIOLATION OF THEIR RIGHTS UNDER THE FEDERAL CIVIL RIGHTS ACT SECTIONS 1983, 1983(2), 1985(3), 1986 AND 1988, AS WELL AS OF THE CALIFORNIA CIVIL RIGHTS, UNRUH, ACT, CALIFORNIA CIVIL CODE SECTIONS 51-53 AND GOVERNMENT CODE SECTION 12948	6
2. NO LAW OF THE CASE NOR CLAIM OR ISSUE PRECLUSIONS APPLIED TO DISMISS PER RULE 12(b)(6) PETITIONERS' COMPLAINT, WHO WERE FURTHER DENIED BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF ANY EVIDENTIARY HEARING PER FEDERAL RULES OF EVIDENCE, RULE 201, ESPECIALLY SUBPART (E)	10

TABLE OF CONTENTS – Continued

Page

3. THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS DELIBERATELY IGNORED AND FAILED, IF NOT REFUSED, TO APPLY THE CALIFORNIA LAW OF DISCOVERY OF FACTS OR THE LAST OVERT ACT DOCTRINE OF CONSPIRACY, EITHER WHICH NOT ONLY TOLLED THE ONE YEAR STATUTE OF LIMITATIONS ON PETITIONERS AND THEIR GRANDSONS' CLAIMS BUT FURTHER, ESTABLISHED THE VALIDITY OF PETITIONERS' CONSPIRACY AVERMENTS OF ALL THEIR CLAIMS 14

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES:

Al-Kvazraji v. St. Francis College, 784 F.2d 505 9

Anthony v. Baker, 767 F.2d 657 (10th Cir. 1985)..... 8

Avitia v. Metro Club of Chicago, 924 F.2d 689 (7th Cir. 1991)..... 13

Bell v. City of Milwaukee, 498 F.Supp. 1339 (E.D.Wis. 1980) 8

Billings v. U.S., 57 F.3d 797 (9th Cir. 1995)..... 7

Brock v. Williams Enterprises of Georgia, Inc., 832 F.2d 567 (11th Cir. 1987)..... 13

Conley v. Gibson, 353 U.S. 41 (1957)..... 7

Crawford v. Houston, 396 F. Supp. 187 (S.S. Tex. 1974)..... 8

Delew v. Wagner, 142 F.3d 1219 (9th Cir. 1998), cert. den., 525 U.S. 1015 (1998)..... 7, 11

Fobbs v. Holy Cross Health Systems, 29 F.2d 1439 (9th Cir. 1994) 7

Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc., 240 F.3d 534 (6th Cir. 2001) 13

Haddle v. Garrison, 525 U.S. 489 (1998)..... 7, 8, 11

Humana, Inc. v. Forsyth, 119 S.Ct. 710 (1999) 11

Hutchins v. TNT/Reddaway Truck Lines, Inc., 939 F.Supp. 721 (N.D. Cal. 1996) 10

TABLE OF AUTHORITIES – Continued

Page

In re Hopkins, 146 F.3d 729 (9th Cir. 1998) 10

Karim-Panahi v. L.A. Police Dept, 839 F.2d 621 (9th Cir. 1988) 7

Kush v. Rutledge, 460 U.S. 719 (1983) 9

Leatherman v. Tarrant County Narcotics Intelligence & Coordination, 507 U.S. 163 (1993)..... 6

Mendocino Environment Center v. Mendocino County, 14 F.3d 457 (9th Cir. 1994)..... 9

Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944).....10

Montana v. U.S., 440 U.S. 147, 99 S. Ct. 970, 59 L.Ed.2d 210 (1979).....10

O'Neal v. Garrison, 263 F.3d 1317 (11th Cir. 2001).....8, 11

Rizzo v. Goode, 423 U.S. 362 (1975) 8

Rode v. Dellarciprete, 845 F.2d 1195..... 8

Sanders v. Union Pac. R.R. Co., 190 F.3d 1080 (9th Cir. 1999).....12

Sea-Land Serv. v. Gaudet, 414 U.S. 573 (1974) 11

Taylor v. Gilmartin, 686 F.2d 1345 (10th Cir. 1982)..... 9

U.S. v. Frega, 179 F.3d 793 (9th Cir. 1999) 11

Ward v. Connor, 657 F.2d 45 (C.A. 4th Va., 1981), cert. den., 455 U.S. 907 (1982)..... 9

Wyatt v. Union Mortgage Co., 24 C.3d 773 (1974).....14

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONS

First Amendment to the United States Constitution 2, 9

Fourteenth Amendment to the United States Constitution 2

STATUTES AND RULES

18 U.S.C. sections 1631-1639 2

18 U.S.C. section 1965(a), et seq. 1

28 U.S.C. section 1331 1

28 U.S.C. section 1367 1

28 U.S.C. section 1391 1

42 U.S.C. section 1983 .....1, 2, 3, 7

42 U.S.C. section 1985(2).....1, 2, 3, 9

42 U.S.C. section 1985(3).....1, 2, 3, 8, 9

42 U.S.C. section 1986 .....1, 2, 3, 9

42 U.S.C. section 1988 .....1, 2, 3, 9

California Civil Code sections 51-53..... 4

FRAP, Rule 35(b)..... 1

FRCP, Rule 9(b)..... 6

FRCP, Rule 56 10

FRCP Rule 12(b)(6).....2, 9, 10

Fed. R. Evid. 201(c) and (e).....2, 5, 10

Government Code section 12948 4

Sup. Ct. R. 10(a) and (c)..... 1

TABLE OF AUTHORITIES – Continued

Page

Sup. Ct. R. 13(1) and (3) 1

OTHER AUTHORITIES

18 Moore's Federal Practice, Sec. 132.01, 132.02, et seq. (Matthew Bender 3rd ed.) 10, 13

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The short orders from the Ninth Circuit Court of Appeals denying Petitioners' Appeal and Petition for Rehearing En Banc were not to be published and only their respective Docket Numbers identify them, No. 00-56905 and 00-56937.

STATEMENT OF BASIS OF JURISDICTION

1. Appeal Jurisdiction to the Ninth Circuit Court of Appeals was per 28 U.S.C. sections 1331, 1367, 1391, 18 U.S.C. sections 1965(a), et seq., and 42 U.S.C. sections 1983, 1985(2), 1985(3), 1986 and 1988.

2. Petition for Rehearing En Banc timely filed January 15, 2002, was FRAP, Rule 35(b), CR 35-1.

3. Order denying Petition for Rehearing En Banc, May 15, 2002 extended time to file this Petition for Certiorari with Petitioners being given through August 13, 2002 to file this Petition. SCR, Rule 13(1) and (3).

4. Basis of Jurisdiction and Considerations of Review per this Petition are SCR, Rule 10(a) and (c). The Ninth Circuit by its "NOT FOR PUBLICATION" Memorandum, and orders of denial "has so far departed from accepted and usual course of judicial proceedings, or sanctioned such departure by a lower court, as to call for an exercise of this Court's supervisory power" and "has decided important federal questions ... conflict[ing] with relevant decisions of this Court."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN PETITION

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

FEDERAL STATUTES

18 U.S.C. § 1631-1639

42 U.S.C. § 1983

42 U.S.C. § 1985(2)

42 U.S.C. § 1985(3)

42 U.S.C. § 1986

42 U.S.C. § 1988

TREATY – THE HAGUE CONVENTION ON CHILD ABDUCTION, ETC.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(6)

FEDERAL RULES OF EVIDENCE

Rule 201(c) and (e)

STATEMENT OF CASE

Petitioners are two of four original plaintiffs, the other two plaintiffs being their minor grandsons, who filed on April 3, 1996, their verified complaint before the United States

District Court for the Central District of California, No. 96-2381 HLH (BQR) against a number of defendants for violations of their rights per the Federal Civil Rights Act, 42 U.S.C. sections 1983 through 1988. Defendants immediately moved for abstention of said complaint, although some defendants moved to dismiss, which motions were granted and not part of this petition. However, abstention was granted, awaiting the resolution of a state court action initiated by petitioners via their first trial counsel, Bigelow, Moore and Tyre, in Los Angeles Superior Court, Case GC 01040, which then had a trial date set for June 3, 1996. Petitioners' federal complaint alleged that on and after July 4, 1995 they discovered the conspiracies, fraud and collusion of the remaining defendants therein to obstruct justice before said federal court, to destroy their rights and the rights of their two minor grandsons of whom they were legal guardians and ad litem guardians in both said state action and their federal complaint.

The remaining defendants who awaited the reactivation of the federal complaint after the resolution of the state action were: The grandsons' French citizen father, Jacky Bernard Joye, who kidnapped them; Joye's private California attorney, Jacques Beugelmans, who directed, advised and assisted Joye in kidnapping said grandsons; petitioners' former state action trial attorneys, James A. Shalvoy, Franklin T. Bigelow, Jr., and their law firm, Bigelow, Moore and Tyre; the San Marino School District, the principal, Charles Johnson, Mary A. Meye, Perta Santley, Jeanne Lipps, teachers and school personnel. Petitioners had terminated their representation by Bigelow, Moore and Tyre in September 1995, after discovering on July 4-7, 1995 that they were conspiring against them to eliminate not just their state claims but their federal

civil right claims against said defendants as named in their federal complaint, which also included claims of violation of the California Unruh Act, said state's civil rights statute, Cal. Civ. Code sections 51-53 and Cal. Government Code section 12498. Their grandsons, Daniel and Nicholas, ages 12 & 8 at the time of their kidnapping as students for the school district's Huntington and Valentine Schools, had experienced the untold grief of their mother, Joan Cheyovich dying in her sleep in the spring of 1992, while all three were living with their grandparents, Milan and Diana Cheyovich. Their mother had a French Divorce and Custody Decree which granted her full custody to raise the minor sons in California, as they were U.S. and California citizens and all three had been abused by the father and former husband, Jacky Joye. Diana Cheyovich had obtained an order appointing her temporary legal guardian of said grandsons, who lived with her and Milan in San Marino, the same house in which they had lived with their mother for almost three years preceding her death.

Their federal complaint alleged that they were discriminated against by all said remaining defendants, due to the plaintiffs Montengerin Orthodox religious beliefs, practices and ethnic family origins, activities and upbringing, and that due to the Serbian, Yugoslavia's wars of so-called and charged "ethnic cleansing" said defendants conspired and collaborated together to have their grandsons kidnapped from them, taken and kept in France, precluding all contacts, communication and relationships with them, such relationships not only being familial but legal, as to the legal guardianship and ad litem guardian status which Diana Cheyovich occupied and held valid court orders; Jacky Joye had been served with all proper

notices but not only defaulted in contesting such guardianship proceedings, but had been in contact with the court's mediator and investigator who made a report recommending Diana's appointment as general guardian and Joye had further sent derogatory letters and communiques to the guardianship court, criticizing and castigating it for using it's jurisdiction over him and his sons.

The federal district court granted defendants' motion for abstention until the state court action was resolved. Such resolution came via a Not to Be Published decision from the California Court of Appeals, Second District, which affirmed the trial court's reversing a jury's verdict and judgment in the grandparents' favor of some $1.4 million dollars, and the eventual dismissal of all the grandparents and even their grandsons' claims on the basis that said grandsons were with their father and the grandparents could not have obtained permanent legal or physical custody of their grandsons beyond their school year which ended some three days after their kidnapping.

Upon such California appeal's court decision being final, when the State Supreme Court denied the grandparents' petition for Review a Hearing, said defendants remaining in the federal action moved for dismissal on the purported basis of law of the case and some forms of res judicata; defendant Beugelman also moved for dismissal that the claims against him had exceeded the one year California statute of limitations which he claimed was not tolled by any acts of his deception or fraud from not being discovered as a co-conspirator, aider, abettor and advisor to and in securing the grandsons' kidnapping; said defendants' motions were granted, no evidentiary nor due process or equal protection hearing granted nor held per Federal Rules of Evidence, Rule 201, especially subpart (e) thereof

regarding the issues of what was to be judicially noticed and applied from said appeal's court non-public decision.

The grandparents moved to amend their complaint seeking appropriate leave of court to do so, but their motion was denied almost perfunctorily. Their appeal to the Ninth Circuit followed, and their petition for re-hearing en banc.

In granting defendants' motions the federal court did so with prejudice, stating that these petitioners could not plead any federal civil rights claims and their claims on other grounds were barred/precluded by said California appeal's court decision as the law of the case. All of said district court's and the upholding granted thereof by the Ninth Circuit are egregiously contrary not only to the decisions of this Honorable Supreme Court, but the appropriate, controlling case decisions of the Ninth Circuit Court of Appeals.

ARGUMENT

1. PETITIONERS HAD PROPERLY AVERRED VIOLATION OF THEIR RIGHTS UNDER THE FEDERAL CIVIL RIGHTS ACT SECTIONS 1983, 1983(2), 1985(3), 1986 AND 1988, AS WELL AS OF THE CALIFORNIA CIVIL RIGHTS, UNRUH, ACT, CALIFORNIA CIVIL CODE SECTIONS 51-53 AND GOVERNMENT CODE SECTION 12948.

This Supreme Court has held in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination*, 507 U.S. 163, 168 (1993) that except as provided in FRCP, Rule 9(b) there are no heightened rules of pleading, especially as to claims per the federal civil rights acts,

sections 1983, et seq., *Conley v. Gibson* 353 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

The Ninth Circuit's own case decisions of *Karim-Panahi v. L.A. Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988) holds that a claim is sufficient on nothing more than a bare allegation that an individual's official's conduct, actions, etc., conformed to official policy, custom, usage or practices under color of law. Further, in *Fobbs v. Holy Cross Health Systems,* 29 F.2d 1439, 1449 (9th Cir. 1994), plaintiffs can aver more than one conspiracy, multiple conspiracies, joint union of actions, efforts and ventures. Such multiple conspiracies include obstruction of justice, withholding or manufacture/presentation of false, contrived and deceptive evidence as part of a coverup, re: federal court claims and proceeding. *Delew v. Wagner,* 142 F.3d 1219, 1222 (9th Cir. 1994), cert. den., 525 U.S. 1015 (1998). *Delew* applies significantly to sustain petitioners sections 1983 and 1985(2) claims, but although cited to the Ninth Circuit in said appeal, such decision along with the aforesaid were ignored.

The district court's statement that petitioners could not join non-state actors under section 1983 claims is wholly erroneous. That Circuit's decision in *Billings v. U.S.,* 57 F.3d 797, 801 (9th Cir. 1995), holds that not only state employees acting under color of law, authority or title can be subject to section 1983 claims but so can both private individuals and even federal employees who act along with, in conjunction or conspiracy with, such state actors. See also this Court's decisions in *Haddle v. Garrison,* 525

U.S. 489 (1998); *Rizzo v. Goode,* 423 U.S. 362, 377 (1975). In *Haddle,* supra, this Court upheld section 1985(2) and 1985(3) claims of conspiracy to intimidate or retaliate against witnesses in federal court proceedings, etc. The petitioners' minor grandsons were kept in France and brainwashed by their criminally disposed father, were further illegally contacted and their attorney client and other privileges or confidentiality with their grandparents' legal guardians and ad litem guardians, prevented wholly, intimidated and obstructed from any communications or opportunities, let alone actualities, of contact with the grandparents and all their counsel they retained for them and said grandsons' federal claims. The San Marino School's attorneys conspired with the grandparents' and grandsons' initial attorneys, to obtain false declarations for the grandsons after being taken to France, where such grandsons' depositions were constantly disrupted by their father, the grandsons were unwilling to talk with the grandparents, in English or otherwise, although they had been able to converse fluently before in English with their California teachers and said grandparents, their cousins and Montenegrin family members. Such discovery of obstruction of justice and fraud averred against all defendants per said conspiracy are supported by the cases of *Rode v. Dellarciprete,* 845 F.2d 1195; *Anthony v. Baker,* 767 F.2d 657 (10th Cir. 1985); *Bell v. City of Milwaukee,* 498 F.Supp. 1339 (E.D.Wis. 1980); and *Crawford v. Houston,* 396 F.Supp. 187 (S.S. Tex. 1974). See also *O'Neal v. Garrison,* 263 F.3d 1317 (11th Cir. 2001), citing and following *Haddle,* supra, 525 U.S. 489.

Petitioners' grandparents had also averred viable and proper 1985(3) claims against all defendants. The animus class requirement under said section was properly met by

their averments of religious, ethnic and race origins discriminations and of their First Amendment Rights discriminations inflicted and perpetrated upon them by all defendants. *Taylor v. Gilmartin,* 686 F.2d 1345 (10th Cir. 1982) (Religious discrimination is actionable under 1985(3).); *Al-Kyazraji v. St. Francis College,* 784 F.2d 505, 514-18 (Even race classification as Caucasians are to be treated equally without regard to race or ethnicity.); *Ward v. Connor*, 657 F.2d 45 (C.A. 4th Va., 1981), cert. den., 455 U.S. 907 (1982) (Injuries suffered per conspiracy based upon membership in Unification Church stated class-based animus of 1985(3). See and Cf. *Kush v. Rutledge*, 460 U.S. 719, 103 S.Ct. 1483, 75 L.Ed.2d 412 (1983); and *Mendocino Environment Center v. Mendocino County,* 14 F.3d 457, 465 (9th Cir. 1994). Even if the district court had doubt as to such claims, petitioners should have been allowed leave to amend their complaint.

None of the defendants made any motions for a more definite statement, but only motions for dismissal per Rule 12(b)(6) and in considering such averments of the complaint and all reasonable inferences to be deduced therefrom must be accepted/taken as true. The district court not only departed from such rules and principles of construing the complaint but fashioned unsupported rules and principles of the law of the case and res judicata, in relying upon the nonpublic opinion of the California appeal's court in dismissing the complaint entirely.

Since petitioners in their complaint stated viable claims under sections 1985(2) and 1985(3), they also stated a viable claim under section 1986, and their claim for prevailing attorneys fees and other legal costs per section 1988 was more than viable and proper.

2. NO LAW OF THE CASE NOR CLAIM OR ISSUE PRECLUSIONS APPLIED TO DISMISS PER RULE 12(b)(6) PETITIONERS' COMPLAINT, WHO WERE FURTHER DENIED BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS OF ANY EVIDENTIARY HEARING PER FEDERAL RULES OF EVIDENCE, RULE 201, ESPECIALLY SUBPART (E).

The defendants' claims of law of the case, claim preclusion or issue preclusions, i.e., res judicata or collateral estoppel, are effirmative defenses which not only must be sufficiently plead, but the entire burden of proving each of said affirmative defenses apply as a matter of fact and law to each claim against each defendant in petitioners' grandparents' complaint. Both the district court and the Ninth Circuit not only blended and combined such affirmative defenses per said Rule 12(b)(6) motions to dismiss, but further eviscerated petitioners' rights of procedural and substantive due process per Federal Rules of Evidence, Rule 201(c), (e) and F.R.C.P., Rule 56. *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 670-71 (1944); *In re Hopkins*, 146 F.3d 729 731-32 (9th Cir. 1998); *Hutchins v. TNT/Reddaway Truck Lines, Inc.*, 939 F.Supp. 721 (N.D. Cal. 1996). See 18 Moore's Federal Practice, Sec. 132.01, 132.02, et seq. (Matthew Bender 3rd ed.).

This Court has held in *Montana v. U.S.*, 440 U.S. 147, 159, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), citing Moore's Federal Practice, that if there are different pertinent facts in two seemingly like cases, issue preclusion, res judicata is inapplicable, in a subsequent action even raising the same legal issues. More so, where, as pled in petitioners federal complaint new evidence, facts and even intervening changes

in the law, has shown new wrongful acts by the defendants in said federal action, and where, separately, clear error has been committed in the first case or if injustice will result therefrom, plaintiff in the subsequent action is free to litigate such issues there presented. *Sea-Land Serv. v. Gaudet*, 414 U.S. 573, 593 (1974). No issues were litigated in the first action of the conspiracies among the defendants to violate petitioners' federal civil rights, no issues were litigated about the petitioners' discovery during the state action discovery of the fraud, deception and complete complicity of Beugelmans, their own discharged attorneys and the school district attorneys, in such conspiracies, such obstruction of justice and perpetration of perjury, subornation thereof as well as presentation of manufactured and false evidence. The law and intervening case decision of *Haddle, O'Neal* and others supra, *Delew v. Wagner*, etc., were all decided after the jury's verdict being overturned in said state action. See also this Court's enunciations of the law principles in *Humana, Inc. v. Forsyth*, 119 S.Ct. 710 (1999), and the Ninth Circuit's decision in *U.S. v. Frega*, 179 F.3d 793 (9th Cir. 1999).

There were serious issues of absolute lack of jurisdiction, subject matter and over the grandparents' persons of said state court judge and even the California appeals court in its decision to allow any order to be upheld of dismissal of said state action when the trial judge was not only disqualified, but pending his disqualification hearing, he made ex parte contact with the school district's attorney re: how to act while in suspended disqualification and then held a secretive hearing without notice to or the participation of the grandparents or their counsel, whereby he granted defendants' motion for a new trial and also to

dismiss the state action entirely. In doing so, said state judge further impinged upon a family court guardianship judge saying that his granting of guardianship to petitioners was based upon fraudulent evidence when in fact not only had that court the report of a family case worker and investigator who had interviewed the minor grandsons before their abduction, such grandsons stating unequivocally that they wanted to stay with and live with their grandparents, but had investigated both the grandparents and had telephone and written communications with the grandsons' father in France; such investigator as a court official and officer strongly recommended such guardianship be granted to petitioners and it was so. Moreover, no trial court judge, without any basis of affirmative defenses pled, can so nonjudicially intrude upon the lawfully and exclusive jurisdiction of said guardianship court judge and his orders. Lastly, the only person who could have had standing or capacity to so challenge or change such guardianship order was Jacky Joye and he completely defaulted his rights and remained in France, not directing his private California counsel, Jacques Beugelmans to so appear and represent him; the same Beugelmans who directed and counseled Joye to kidnap his sons and take them from any court's jurisdiction in California. Completely misstated by said state appeals' court's decision was that petitioners were not the guardians nor guardians ad litem of their minor grandsons when they were and continued to be up to such grandsons' majority. See the Ninth Circuit's decision in 1999; *Sanders v. Union Pac. R.R. Co.*, 190 F.3d 1080, 1081 (9th Cir. 1999), holding that a judge's acts of proceeding without jurisdiction, are not only "renegade ultra vires" acts but deprive such judge of any judicial immunity citing this court's decisions.

Nothing more can be egregiously unacceptable nor a blemish of improper protectionism given such state court judge's actions; then when the federal courts, try to keep from the public's knowledge and even from the bar, the fact and notoriety of judicial errors, biased jurist's mindset and the utter neglect of duty and responsibility to apply the laws and decisions fair, equally and contemporaneously, especially when the petitioners are elderly, frail and health affected individuals who can be buried or left to die along the judiciary's graveyard of misdeeds and unsupportable rulings.

No hearing was allowed nor provided, for such unpled affirmative defenses, in the district court's taking of whatever wrongful judicial notice it did of said state court's appellate decision. See also *Brock v. Williams Enterprises of Georgia, Inc.*, 832 F.2d 567, 574 (11th Cir. 1987); *Franklin County Convention Facilities Auth. v. American Premier Underwriters, Inc.*, 240 F.3d 534, 550-552 (6th Cir. 2001); 18 Moore's Federal Practice, section 132.03 (Matthew Bender, 3rd ed.). The district court's failure to comply with all standards of due process and equal protection in supposedly taking such judicial notice and granting defendants' motions for dismissal with prejudice. *Avitia v. Metro Club of Chicago*, 924 F.2d 689, 691 (7th Cir. 1991).

3. THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS DELIBERATELY IGNORED AND FAILED, IF NOT REFUSED, TO APPLY THE CALIFORNIA LAW OF DISCOVERY OF FACTS OR THE LAST OVERT ACT DOCTRINE OF CONSPIRACY, EITHER WHICH NOT ONLY TOLLED THE ONE YEAR STATUTE OF LIMITATIONS ON PETITIONERS AND THEIR GRANDSONS' CLAIMS BUT FURTHER ESTABLISHED THE VALIDITY OF PETITIONERS' CONSPIRACY AVERMENTS OF ALL THEIR CLAIMS.

This court has held, as has the Ninth Circuit, that the applicable statute of limitations as to federal civil rights claims is the statute of limitations of the state in which such violations are alleged to have occurred. In California, such statute is one (1) year from the date of such occurrence or one (1) year from the actual date of discovery. But more important is that the California Supreme Court, in *Wyatt v. Union Mortgage Co.*, 24 C.3d 773, 782-786 (1974), held such statute of limitations never begins to run at all, when the last overt act per such alleged conspiracy has not yet occurred but is in fact alleged to still be continuing or ongoing. The *Wyatt* decision has not been overturned nor modified to alter either of said doctrines, and both applied herein to allow petitioners to pursue all their claims against Jacques Beugelmans. However, it was difficult for the district court and the Ninth Circuit to apply *Wyatt* when it has been in application for over 28 years and allowed petitioners' claims as to all other defendants as well.

CONCLUSION

This Petition for Writ of Certiorari should be granted upon all grounds, basis or points raised and those inherently included herein or part thereof.

DATED: August 13, 2002

MILAN CHEYOVICH
DIANA CHEYOVICH

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILAN CHEYOVICH; DIANA CHEYOVICH, individually and as Court Appointed Guardian for Daniel Milan Lucien Cheyovich Joye and Nicolas Marc David Cheyovich Joye, minors, Plaintiffs-Appellants, v. SAN MARINO SCHOOL DISTRICT, JOHN BEUGELMAN, a.k.a. Jacques Beuglemans, et al., Defendants-Appellees	Nos. 00-55905 00-56937 D.C. No. CV-96-02381-HLH MEMORANDUM* (Filed Dec. 27, 2001)

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Submitted December 17, 2001**

Before: SCHROEDER, Chief Judge, TROTT and PAEZ, Circuit Judges.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument, and denies appellants' request for oral argument. *See* Fed. R. App. P. 34(a)(2).

Milan Cheyovich and Diana Cheyovich appeal pro se the district court's orders dismissing for failure to state a claim their action alleging that defendants engaged in a conspiracy with their grandchildren's biological father to kidnap the grandchildren. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Monterrey Plaza Hotel, Ltd. v. Local 483*, 215 F.3d 923, 926 (9th Cir. 2000), and we affirm on the ground that the district court lacked subject matter jurisdiction, *Steel Co. v. Citizen for a Better Environment*, 532 U.S. 83, 94-95 (1998).

Despite appellants' attempts to raise claims separate from the prior state court custody action, the two are inextricably intertwined. Because federal courts do not have jurisdiction to review state court decisions, we affirm the district court's dismissal of appellants' action. *See Worldwide Church of God v. McNair*, 805 F.2d 888, 890-93 (9th Cir. 1986) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983)).

We have considered appellants' remaining contentions and reject them for lack of merit. We grant appellants' motion to file a late reply brief and order that the reply brief received on April 11, 2001 be filed.

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 00-55905
CT/AG#: CV 96-02381-HLH

MILAN CHEYOVICH; DIANA CHEYOVICH, individually and as Court Appointed Guardian for Daniel Milan Lucien Cheyovich Joye and Nicolas Marc David Cheyovich Joye, minors

Plaintiffs Appellants

v.

DAN MARINO SCHOOL DISTRICT

Defendant

and

JOHN BEUGELMAN,
aka Jacques Beuglemans

Defendant Appellee

NO. 00-56937
CT/AG#: CV 96-02381-HLH

MILAN CHEYOVICH; DIANA CHEYOVICH, individually & as Court Appointed Guardian for Daniel Milan Lucien Cheyovich Joye & Nicholas Marc David Cheyovich Joye, minors

Plaintiffs-Appellants

v.

SAN MARINO SCHOOL DISTRICT, JACKY BERNARD JOYE; JUDITH D. ANDERSON, individually dba Law Firm of Walsh & Declues

dba Law Firm of Liebman, Reiner & Walsh; MICHAEL J. DECLUES, individually dba Law Firm of Walsh & Declues dba Law Firm of Liebman, Reiner & Walsh; JAMES A. SHALVOY, individually dba Law Firm of Bigelow, Moore & Tyre; FRANKLIN T. BIGELOW, JR., individually dba Law Firm of Bigelow, Moore & Tyre; CHARLES JOHNSON, individually & an agent for Focus on the Family; MARY A. MEYE; PERTA SANTLEY

Defendants-Appellees

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles, and was duly submitted.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered December 27, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. CV 96-2381 HLH (RMCx) Date Sept. 25, 2000

Title Cheyovich et al. v. San Marino Unified School District, et al.

DOCKET ENTRY

PRESENT

HON. HARRY L. HUPP, JUDGE

Jim Holmes
Deputy Clerk

Not Present
Cynthia L. Mizell
Court Recorder

ATTORNEYS PRESENT FOR PLAINTIFFS:

Patricia J. Berry✓

ATTORNEYS PRESENT FOR DEFENDANTS:

J. Michael DeClues
/s/ G. Wille✓
Randall A. Miller
Michael McCarthy
/s/ J. Evans
/s/ R. Jenkins✓

PROCEEDINGS: SAN MARINO SCHOOL DISTRICT, ET AL'S, MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND MOTION TO STRIKE; BIGELOW MOORE & TYRE'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM; JAMES SHALVOY'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AND REQUEST FOR JUDICIAL NOTICE

ORDER (also if applicable, findings and memorandum opinion):

The motions to dismiss of (1) James Shalvoy (hereafter Shalvoy) and of Franklin T. Bigelow, Jr. and Bigelow, Moore & Tyre (hereafter collectively Bigelow), and (2) San Marino Unified School District, Charles Johnson, Mary E. Meye, and Perta Stanley (hereafter collectively SMUSD), and (3) Judith Anderson and Walsh & DeClues (hereafter collectively W&D) are each granted without leave to amend and the action is dismissed against each of said defendants (without prejudice as to Bigelow and W&D and with prejudice as to SMUSD. The motions to strike are denied as moot in view of dismissal of action on the motions.

The court notes that the action has already been dismissed as to Jacques Beugelmans and no further action needs to be taken as to him.

The court further notes that no service of the summons and complaint appears to have been made as to defendant Jacky B. Joye and that he has otherwise not appeared in this action. He is dismissed from this action for failure to prosecute under FHCP 4(m).

As to the Bigelow defendants, there is no federal jurisdiction against them and they are dismissed without prejudice for lack of jurisdiction. The Bigelow defendants are alleged to have been attorneys for plaintiffs in the state court action but were dismissed as attorneys by the Cheyovichs in 1995 or 1996. They are accused of committing malpractice in their handling of the Cheyovich's state court lawsuit. This, of course, is an action arising under state law since and there is no diversity or a federal question to give this court jurisdiction. Plaintiffs argue

that the court should retain the case under the doctrine of supplemental jurisdiction (28 USC § 1367). However, the charges against the Bigelow defendants do not arise out of the same set of facts as does the lawsuit against SMUSD, a prerequisite for the exercise of supplemental jurisdiction. Further, as stated below, the action against SMUSD will be dismissed under the doctrine of res judicata, leaving no federal action for the Bigelow case to be supplemental to.

Judicial notice is taken of the pleadings and decisions in the state court action as requested. As to the SMUSD defendants, the result is the state court action is res judicata of all the claims asserted in this action. The state court action asserted violations of 42 USC § 1983 and also various state law torts. The action ended with a State Court of Appeal decision vindicating SMUSD and its employees on all grounds charged following a complete trial on the merits of the case. The branch of res judicata called "bar" prevents litigation of any of the causes of action that were raised and tried or of issues which could have been raised and tried in the state court. The opinion of the Court of Appeal leaves it clear that there is nothing that is alleged here which does not come within the scope of the state court action. There is no possible basis for amendment; thus the action against SMUSD and its employees is dismissed without leave to amend and the action dismissed against them.

The action against W&D must also be dismissed, partly on res judicata grounds insofar as a conspiracy to violate § 1983 is alleged, and partly for lack of jurisdiction insofar as state law torts are alleged. W&D were not defendants in the state court action. Therefore, res judicata could only apply if W&D were alleged to be in conspiracy

with the state actor (meaning SMUSD). In this action, they are alleged to have conspired with SMUSD to violate § 1983. The holding in the state court action that § 1983 was not violated by SMUSD renders this part of the complaint against W&D subject to the res judicata defense, since in that the state actor did not violate § 1983, or conspire to do so, any action by W&D (not a state actor) could not have been in conspiracy with SMUSD to violate the section. The other claim against W&D is a state law tort (tortious interference with custody). Since there is no defendant left with a federal claim against it (SMUSD being dismissed), the matter is dismissed for lack of federal jurisdiction under 28 USC § 1367(c)(3). The motion to dismiss as to W&D is granted without leave to amend on the conspiracy charges under § 1983 and the balance of the action is dismissed for lack of federal jurisdiction.

There being no undismissed claims, the action is dismissed by order signed and filed this date.

The status conference scheduled for this date is off calendar as moot.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHEYOVICH, et al., Plaintiffs, v. SAN MARINO SCHOOL DISTRICT, et al., Defendants.	No. CV96-2381-HLH (RMCx) ORDER DISMISSING ACTION (Filed Sep. 25, 2000)

This action is dismissed as follows:

Without Prejudice: James Shelvoy, Franklin T. Bigelow, Jr., Bigelow, Moore & Tyre, Judith Anderson, Walsh & DeClues and Jacky B. Joye;

With Prejudice: San Marino Unified School District, Charles Johnson, Mary E. Meye and Perta Stanley.

This Order is a final judgment for purposes of Fed. R. Civ. P. 54(a). It shall be entered pursuant to Fed. R. Civ. P. 58 and 79(a), and served upon the parties.

IT IS SO ORDERED.

Date: September 25, 2000.

/s/ Harry L. Hupp
HARRY L. HUPP
Senior United States
District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MILAN CHEYOVICH; DIANA CHEYOVICH, individually and as Court Appointed Guardian for Daniel Milan Lucien Cheyovich Joye and Nicolas Marc David Cheyovich Joye, minors, Plaintiffs-Appellants, v. SAN MARINO SCHOOL DISTRICT, JOHN BEUGELMAN, a.k.a. Jacques Beugleman, et al., Defendants-Appellees	Nos. 00-55905 00-56937 D.C. No. CV-96-02381-HLH Central California ORDER (Filed May 15, 2002)

Before: SCHROEDER, Chief Judge, TROTT and PAEZ, Circuit Judges

The panel has voted to deny appellants' petition for panel rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

No further filings shall be accepted in this closed appeal.

U.S. CONST. AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

---

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

* * *

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or

his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

---

42 U.S.C. § 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, [illegible] such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action was accrued.

---

42 U.S.C. § 1988. (b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the

court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

No. 02-234

Supreme Court, U.S.
FILED
SEP 13 2002
CLERK

In The
Supreme Court of the United States

MILAN CHEYOVICH; DIANA CHEYOVICH, Individually and as Court Appointed Guardian for Daniel Milan Lucien Cheyovich Joye and Nicolas Marc David Cheyovich Joye, minors,

Petitioners,

v.

SAN MARINO SCHOOL DISTRICT; JOHN BEUGELMAN, a.k.a. Jacques Beuglemans, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GREGORY A. WILLE
Counsel Of Record
DECLUES & BURKETT, LLP
6 Hutton Center Drive, Suite 1050
P.O. Box 22021
Santa Ana, CA 92702-2021
(714) 436-1776

Attorneys for Respondents San Marino Unified School District, Charles Johnson, Mary A. Meye, Perta Santley, Judith D. Anderson, and Walsh & Declues, LLP

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	1
The Incident Which Forms the Basis of this Suit	1
The French Custody Action	2
The Superior Court Action	2
Appellate Review of the Superior Court Judgment	3
The Action Before the District Court	4
The Ninth Circuit Appeal	5
THIS CASE IS NOT APPROPRIATE FOR REVIEW	6
Since Petitioners Attempted a Collateral Attack on the State Court Judgment, Certiorari Is Not Proper	6
Res Judicata and Collateral Estoppel Barred the District Court Action	7
The Argument Petitioners Had Properly Averred Civil Rights Violations in Their First Amended Complaint Does Not Present a Compelling Reason for this Honorable Court to Hear this Case	10
The Statute of Limitations Argument Presents No Compelling Reason for This Honorable Court to Grant Certiorari	11
CONCLUSION	12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Branch v. Tunnell, 14 F.3d 449 (9th Cir.1994) 9

Delew v. Wagner, 143 F.3d 1219 (9th Cir.1998) 10

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983) 6

Hal Roach Studios, Inc. v. Richard Feiner and Company, Inc., 896 F.2d 1542 (9th Cir.1990) 8

MGIC Indemnity Corporation v. Weisman, 803 F.2d 500 (9th Cir.1986) 9

Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979) 7

Northland Casualty Company v. Wescal Yachts, Inc., 60 F.Supp.2d 1027 (C.D.CA 1999) 9

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 100 S.Ct. 2467, 65 L.Ed.2d 506 (1980) 5

In Re: Stac Electronic Securities Litigation, 89 F.3d 1399 (9th Cir.1996) 9

Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) 7

Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir.1997) 10

Williamson v. General Dynamics Corporation, 208 F.3d 1144 (9th Cir.2000) 9

Worldwide Church of God v. McNair, 805 F.2d 888 (9th Cir.1986) 6

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

28 U.S.C. Section 1257 6

42 U.S.C. Section 1983 2

FEDERAL RULES OF CIVIL PROCEDURE

Rule 12(b)(6) 9

FEDERAL RULES OF EVIDENCE

Rule 201(e) 8

UNITED STATES SUPREME COURT RULES

Rule 10 6

Rule 14.6 5

STATE STATUTES

Civil Code Section 51 (Unruh Civil Rights Act) 2

INTRODUCTION

This action arises out of disgruntled grandparents' efforts to recover from, among others, a school district, its employees, and their attorneys on the theory they were somehow responsible for petitioners' grandchildren being taken by their father, after the grandchildren's mother suddenly died. But, after a trial on the merits the State Courts of California have found no liability, and the Federal Courts which have examined this suit found it barred by the judgment in the State Court action. Notwithstanding, petitioners now seek a writ of certiorari.

STATEMENT OF THE CASE

The Incident Which Forms the Basis of this Suit.

On June 15, 1992, Jacky Bernard Joye was the non-custodial father of Daniel Joye, and Nicolas Joye.[1] (CR 200 at 4.) After Daniel and Niko's mother unexpectedly died, petitioners disputed Joye's right to raise his sons. (*Id.*) Joye removed his sons from adjacent campuses operated by San Marino Unified School District. (*Id.*) District believes both Daniel and Niko knew of the plan prior to the date of the incident. Joye successfully removed Daniel and Niko to France.

[1] Hereinafter "Niko."

The French Custody Action.

The French Courts have determined, in an opinion announced December 16, 1996, that although Joye improperly removed them from the United States, neither Daniel nor Niko should be returned. The French Court found Daniel was too old to fall within the provisions of the applicable Hague Convention, and Niko stated his desire to remain with his father. The French Court found Niko had "reached an age and degree of maturity which make it appropriate to take account of his opinion" regarding the persons to be given custody of him. Accordingly, the French Court did not order the return of either Daniel or Niko to petitioner grandmother; instead the Court made an order regarding visitation. (CR 180, Exhibit "A.")

The French Court did not make any finding regarding the means by which Joye removed Daniel and Niko from the United States – the only finding in this regard was that the removal of Daniel and Niko was unlawful.

The Superior Court Action.

On June 15, 1993, petitioners Milan Cheyovich and Diana Cheyovich filed suit in the Los Angeles County Superior Court, on behalf of themselves and on behalf of Daniel and Niko. Petitioners filed a First Amended Complaint, in the Superior Court. This First Amended Complaint purported to allege causes of action for, *inter alia*, violation of petitioners' civil rights. These Causes of Action were brought under, *inter alia*, 42 U.S.C. section 1983, and the Unruh Civil Rights Act, Civil Code section 51 *et seq.* The action was prosecuted and discovery was undertaken. (CR 190, Exhibit "A"; App. A-6 to A-7.)

District and its employees made a Motion for Summary Judgment or in the Alternative For Summary Adjudication of Issues in the Superior Court action. The Superior Court granted summary adjudication of the civil rights causes of action, among other things. (App. A-6 to A-7.)

The Superior Court case was tried to a jury on theories of breach of mandatory duty, negligent infliction of emotional distress and negligence. Nonsuit entered against Daniel and Niko on all causes of action which survived the summary judgment motion, and against petitioners on all surviving causes of action, except for negligence against District, Meye, Santley, and Johnson. Judgment was entered for nearly $1.4 million in favor of petitioners, and against District, Meye, and Santley. (App. A-7 to A-8.)

District, Meye and Santley, brought motions for a new trial and judgment notwithstanding the verdict. The Superior Court granted the motion for new trial, and denied the motion for judgment notwithstanding the verdict. (App. A-8.)

Appellate Review of the Superior Court Judgment.

Petitioners appealed from the new trial order, and from various pretrial motions, including the summary judgment motion. San Marino Unified School District, Meye and Santley cross-appealed. (App. A-8.) The California Court of Appeal affirmed the ruling on the summary judgment motion (App. A-10 to A-15), affirmed the nonsuit (App. A-19 to A-23), and reversed the denial of the motion for judgment notwithstanding the verdict. (App. A-24 to A-26.) The Court of Appeal ordered entry of judgment in favor of

San Marino Unified School District, Meye and Santley, and against petitioners.

In making its ruling, the Court of Appeal noted there was no evidence of a conspiracy between Joye and any District employee. In fact, the Court of Appeal stated: "Appellants apparently contend the school employees had prior knowledge of Joye's plans and aided him in carrying them out. The evidence, however, does not support this contention. In fact, the evidence establishes conclusively Joye acted alone and only enlisted the aid of the children in carrying out his plan." (App. A-11 to A-12.)

The California Supreme Court denied petitioners' petition for review. (CR 190, Exhibit "C.")

The Action Before the District Court.

Before the matter was tried in the Superior Court, petitioners brought an action in the United States District Court for the Central District of California. (CR 1.) The District Court stayed the action to await the outcome of the Superior Court action. (CR 73.)

Upon resolution of the State Court action, the District Court lifted the stay. (CR 136.) The District Court granted Jacques Beuglemans' motion to dismiss, and the petitioners appealed, *Cheyovich v. Beuglemans*, Ninth Circuit Docket Number 00–55905.

By way of a motion in the District Court, petitioners sought, and received, leave to amend their complaint. (CR 179.) An excerpt of the State Court of Appeal opinion was attached as an exhibit to the First Amended Complaint. (CR 200, Exhibit "12.") DISTRICT, and the other remaining defendants, moved to dismiss the First Amended Complaint.

(CR 203.) Petitioners' opposition is significant because in it: (1) petitioners made clear the only District-related parties they intended to proceed against were District, Meye, Santley, Johnson, Anderson and WALSH & DECLUES, LLP[2] (CR 211 at 2.), and (2) petitioners argued the District Court ought not take judicial notice of the state Appellate Court opinion. (CR 211 at 6-11.) The District Court granted as to San Marino Unified School District and its employees with prejudice, based upon res judicata. (CR 7-8.) The District Court dismissed without prejudice but without leave to amend as to the state-law claims against the other defendants. (App. 9.)

The Ninth Circuit Appeal.

Petitioners appealed from the District Court ruling. After briefing,[3] the Ninth Circuit affirmed. (App. 1-4.) That Court found that the District Court action and the State Court action were "inextricably intertwined," and therefore the dismissal was proper. (App. 2.)

Petitioners sought, and were denied, rehearing. (App. 10.) This petition followed.

---

[2] Hereinafter collectively "DISTRICT."

[3] Of the District-related parties, only San Marino Unified School District, Charles Johnson, Mary A. Meye, and Perta Santley were appellees. Therefore only they are respondents to the Petition. Rule 14.6; *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783 fn.14, 100 S.Ct. 2467, 2474 fn. 14, 65 L.Ed.2d 506 (1980).

THIS CASE IS NOT APPROPRIATE FOR REVIEW

Procedurally and factually, this case is not appropriate for review by this Honorable Court. No compelling reason exists to grant the requested writ. Yet, a compelling reason is required by this Honorable Court's Rule 10.

Since Petitioners Attempted a Collateral Attack on the State Court Judgment, Certiorari Is Not Proper.

In the District Court action, petitioners attempted a collateral attack upon the State Court judgment in favor of DISTRICT. But, the District Court had no authority to review the final determinations of a State Court in judicial proceedings. 28 U.S.C. section 1257; *Worldwide Church of God v. McNair*, 805 F.2d 888, 890-891 (9th Cir.1986). This doctrine applies even when the challenge to the State Court decision involves federal constitutional issues, equal protection rights, or federally protected due process. 805 F.2d at 891. The District Court is without authority to review the final determinations of State Courts in judicial proceedings. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 463-464, 476, 103 S.Ct. 1303, 1305, 1311, 75 L.Ed.2d 206 (1983). Of course, the State Court proceedings were judicial since they "involved a 'judicial inquiry' in which the court was called upon to investigate, declare, and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.' *Prentis v. Atlantic Coast Line*, 211 U.S., at 226, 29 S.Ct., at 69." *Id.* at 479, 103 S.Ct at 1313, 75 L.Ed.2d 206.

Since the action was filed in the District Court based upon federal question jurisdiction, and the issues giving

rise to the federal question had already been decided in the State Court, the District Court was without jurisdiction. *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83, 94-95, 118 S.Ct. 1003, 1012, 140 L.Ed.2d 210 (1998). If this action had proceeded, the jurisdiction of this Honorable Court would not have been on the merits, but merely for the purpose of correcting the error of the lower Court in entertaining the suit. *Id.* at 95, 118 S.Ct. at 1013, 140 L.Ed.2d 210. Of course, since the action did not proceed, certiorari is not appropriate in this case.

Res Judicata and Collateral Estoppel Barred the District Court Action.

A fundamental precept of common-law adjudication is that a right, question or fact distinctly put in issue and directly determined by a Court of competent jurisdiction cannot be relitigated in a subsequent suit between the same parties or their privies, under the doctrines of res judicata and collateral estoppel. *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979). Because petitioners freely and without reservation submitted their federal claims for decision by the State Court, and had them decided there, the District Court action was barred by res judicata and collateral estoppel. *Id.* at 163, 99 S.Ct. at 978, 59 L.Ed.2d 210.

Here, petitioners wish to avoid the impact of res judicata and collateral estoppel. However, review of the State Court of Appeal's opinion reveals petitioners raised their federal civil rights claims in the State Court suit. (App. A-13 to A-15.) In fact, although it does not appear to be necessary to this Court's determination, it appears collateral estoppel bars the issues the District Court

dismissed without prejudice, but without leave to amend. (App. 8, App. A-8 to A-10.)

Nor can petitioners reasonably assert any unfairness in the State Court proceeding. The Superior Court's denial of District and its employee's motion for judgment notwithstanding the verdict was reversed by well-respected Justices of the California Court of Appeal. The California Supreme Court denied review. While petitioners have asserted impropriety by counsel and the Trial Judge, these issues have been investigated by the State Bar of California regarding the charges against counsel (CR 190, Exhibits "I," "J," and "K."), and by an independent Superior Court Judge sitting in a different county regarding the purported prejudice of the Trial Judge. (CR 190, Exhibit "B.")

Collateral estoppel and res judicata would bar litigation of petitioner's suit. This Honorable Court may properly deny the requested Writ of Certiorari.

And although petitioners have asserted the District Court improperly took judicial notice of the State Court appellate opinion, that is not the case. Petitioners' reliance on Federal Rule of Evidence 201(e), is misplaced. First, an excerpt of the opinion is attached to the First Amended Complaint – the pleading at issue in the motion to dismiss. Second, a substantial portion of petitioners' opposition to the motion to dismiss was addressed to the propriety of taking the judicial notice.

Since a partial copy of the opinion is attached to the First Amended Complaint, the District Court properly examined the entire opinion. *Hal Roach Studios, Inc. v. Richard Feiner and Company, Inc.*, 896 F.2d 1542, 1555, fn.19 (9th Cir.1990). A document is not outside the pleading if the complaint specifically refers to the document and its

authenticity is not questioned. *Branch v. Tunnell*, 14 F.3d 449, 453-454 (9th Cir.1994). The document may be considered even if it is not attached to the complaint, under those circumstances. *Id.* at 454. The Court may properly consider the full text of a document, including portions of the document which were not mentioned in the complaint. *In Re: Stac Electronic Securities Litigation*, 89 F.3d 1399, 1409, fn. 4 (9th Cir.1996).

The District Court properly took judicial notice of the opinion of the State Court of Appeal, and could have taken judicial notice of the decision of the State Bar of California. *MGIC Indemnity Corporation v. Weisman*, 803 F.2d 500, 504 (9th Cir.1986). A District Court may take judicial notice of official records and reports without converting a Rule 12(b)(6) motion into a Motion for Summary Judgment. *Northland Casualty Company v. Wescal Yachts, Inc.*, 60 F.Supp.2d 1027, 1028 (C.D.CA 1999).

Even if the claims for relief are not barred by res judicata, they are barred by collateral estoppel. The elements of collateral estoppel are set forth in *Williamson v. General Dynamics Corporation*, 208 F.3d 1144, 1157, fn.4 (9th Cir.2000).

Here, the State Court found that there were no civil rights violations committed by District or any of its employees with respect to petitioners, that there was no evidence that District or its employees conspired with or assisted Joye in his plan to remove Daniel and Niko from the country, that neither District nor its employees was negligent with respect to the removal of Daniel and Niko from the country, and that petitioners were not damaged. Petitioners are collaterally estopped from maintaining vital elements of each claim for relief.

The Argument Petitioners Had Properly Averred Civil Rights Violations in Their First Amended Complaint Does Not Present a Compelling Reason for this Honorable Court to Hear this Case.

Petitioners' assertion the District Court stated the petitioners cannot join non-state actors under section 1983 claims misinterprets the ruling. The District Court found that since there was no violation of petitioners' federal civil rights, there could have been no conspiracy to violate those rights. (App. 7-8.) Neither the District Court nor the Ninth Circuit examined the issue urged by petitioners. Accordingly, this issue does not present a compelling reason for this Honorable Court to grant the requested writ of certiorari.

Similarly, petitioners' reliance on *Delew v. Wagner*, 143 F.3d 1219 (9th Cir.1998) is of no assistance to them. There, the Court found plaintiffs might be able to allege a claim for relief after resolution of the then-pending State Court action, if they were able to "demonstrate that the defendants' cover-up violated their right of access to the courts by rendering 'any available state court remedy ineffective.'" 143 F.3d at 1223 (citing *Swekel v. City of River Rouge*, 119 F.3d 1259 (6th Cir.1997).) In this case, petitioners have not pointed to any improper action which denied them access to the State Courts. Petitioners' only real complaint is that they do not like the results obtained. There is simply no basis upon which to find plaintiffs were denied meaningful access to the State Courts. In fact, the allegations of conspiracy were raised in the State Court action and were examined by the State Court of Appeal. (App. A-8 to A-10.) Therefore, petitioners are essentially requesting an examination of what they see as an incorrect factual finding in the State Court.

While petitioners have argued the State Court proceeding was unfair to them, petitioners had every opportunity to raise this unfairness before the Trial Court, and before the Court of Appeal. This case does not present a compelling reason to grant certiorari.

The Statute of Limitations Argument Presents No Compelling Reason for This Honorable Court to Grant Certiorari.

Although the statute of limitations argument in the Petition appears to be primarily directed at Beuglemans, it could be read broadly enough to encompass parties who were defendants in the District Court – even those not respondents in this Petition. Regardless, given the basis for the decision in the District Court, and in the Ninth Circuit Court of Appeals, no issue worthy of this Honorable Court has been presented.

CONCLUSION

No issue worthy of this Honorable Court's time has been presented in the Petition. Petitioners improperly seek review of the issues decided by the State Courts. Collateral estoppel and res judicata provide complete bars to the claims raised in the District Court.

This Honorable Court may properly deny the Petition.

DATED: September 13, 2002

Respectfully submitted,

GREGORY A. WILLE
Counsel Of Record
DECLUES & BURKETT, LLP
6 Hutton Center Drive, Suite 1050
P.O. Box 22021
Santa Ana, CA 92702-2021
(714) 436-1776

Attorneys for Respondents San Marino Unified School District, Charles Johnson, Mary A. Meye, Perta Santley, Judith D. Anderson, and Walsh & Declues, LLP

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DIANA CHEYOVICH, et al., Plaintiffs and Appellants, v. SAN MARINO UNIFIED SCHOOL DISTRICT, et al., Defendants and Respondents.	B110228 (Super. Ct. No. G010140) (Filed Aug. 23, 1999)

APPEAL from orders and judgment of the Superior Court of Los Angeles County. Judge J. Michael Byrne and Judge Coleman A. Swart. Affirmed in part and reversed and remanded in part with directions.

Milan Cheyovich and Diana Cheyovich, Plaintiffs and Appellants in propria persona.

Walsh & Declues, J. Michael Declues and Gregory A. Wille for Defendants and Respondents San Marino Unified School District, Mary A. Meye, Perta Santley, Jeanne Lipps, Sheryl Goodreau, Jack R. Rose, Carol Miller, Charles Johnson and Gary R. Richards and Cross-Appellants San Marino Unified School District, Mary A. Meye, and Perta Santley.

Appellants Milan Cheyovich and Diana Cheyovich (the Cheyoviches) appeal from an order granting a new trial in their action for damages and injunctive relief based upon their son-in-law's allegedly wrongful taking of

appellants' minor grandchildren Daniel and Niko Cheyovich from their school. The Cheyoviches also appeal from various pretrial orders relating to discovery, sanctions, dismissal of the minor plaintiffs from the action, summary judgment, and ten pretrial motions filed by appellants. Respondents San Marino Unified School District, Mary A. Meye, Perta Santley, Jeanne Lipps, Sheryl Goodreau, Jack R. Rose, Carol Miller, Charles Johnson and Gary R. Richards cross-appeal the judgment as well as the trial court's denial of their motions for non-suit and judgment notwithstanding the verdict.

We conclude the trial court correctly granted summary judgment or non-suit in respondents' favor on all causes of action except for the negligence claim. We also conclude the trial court erred in denying respondents' motion for judgment notwithstanding the verdict on the negligence claim. Because these holdings mandate entry of judgment in respondents' favor, we do not consider whether the trial court erred in granting respondents' new trial motion, and instead remand this matter to the trial court and direct judgment be entered in favor of respondents on all causes of action of appellants' first amended complaint. We also affirm the trial court's order denying appellants' ten pretrial motions and awarding of sanctions to respondents.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

The Cheyoviches are the parents of Joan Cheyovich and the grandparents of Daniel and Niko Cheyovich. In March 1992, Daniel and Niko were ages 11 and 9, respectively, and living with their mother Joan Cheyovich at the Cheyoviches' home in San Marino. Daniel and Niko attended school at Henry E. Huntington School and Valentine Elementary School, which were schools run by respondent San Marino Unified School District (San Marino).

Joan Cheyovich was divorced from the boys' father, Jacky Bernard Joye (Joye), a French citizen who lived in France. Joan had been awarded custody of the two boys by a French court, although the boys were United States citizens. In March 1992, Joan unexpectedly died. After her funeral, Joye discussed with the boys whether they desired to live in the United States with appellants, or return to France and live with him. Both Daniel and Niko said they wished to return to France. Joye determined the boys should remain with appellants until June, in order to complete the school year, and allow Joye to arrange for child care in France. Joye advised appellants of these plans, and provided money to appellants to assist in supporting the boys until June.

---

[1] We granted appellants' request to take judicial notice of the files in connection with their petition for writ of mandate and stay of proceedings filed in connection with the denial of their motion to disqualify Judge Swart pursuant to Code of Civil Procedure section 170.6 (Appeal Nos. B109078 and B111048).

However, on May 8, 1992, the Cheyoviches obtained ex parte letters of temporary legal guardianship of Daniel and Niko, purportedly to authorize any necessary medical treatment for the boys, and apparently in part based upon representations Joye did not intend to claim custody of the children. The temporary guardianship was set to expire on June 18, 1992; consequently, a hearing was scheduled for June 18, 1992, to issue the Cheyoviches letters of permanent guardianship. In spite of Joye's intent to take the boys, the Cheyoviches did not want to relinquish the children and they were fearful Joye would attempt to abduct the boys. Diana Cheyovich discussed these concerns with the administrators at both Henry E. Huntington School and Valentine Elementary School. Joan Cheyovich gave them copies of the letters of temporary guardianship and explained the boys were not to be released to anyone other than the Cheyoviches. She also spoke with the San Marino Police Department and was promised the Police Department's full cooperation and immediate response to any calls from respondents regarding Joye's presence at either school.

Nevertheless, on June 15, 1992, pursuant to a prearranged plan with the children, Joye, who had returned to the U.S., picked up the children from their schools. After Milan Cheyovich drove Daniel to Henry E. Huntington School, Daniel pretended to go to class but instead waited in the parking lot and then left the school grounds where he met Joye. Daniel advised Joye to write a note to the school advising them he would not be in that day, otherwise the school would contact appellants. Joye did not speak with anyone at the school that day regarding Daniel.

Joye and Daniel then went to Valentine School to pick up Niko.[2] Joye confronted the school's principal, respondent Mary Meye (Meye). Meye told Joye he could not take Niko because of the court order granting temporary guardianship to the Cheyoviches. Joye left Meye's office but told her would be back. Meye contacted Perta Santley (Santley), Niko's teacher, and asked her to come to the office. Santley, who was in the teachers' room at the time because school had not yet started, met Joye as she exited the room. Joye handed her a letter and stated he had come to get Niko. Joye then asked Santley how to get to the playground and then stated he would find it himself. Santley went to her classroom and then went to look for Meye to report the conversation and the note, but was unable to find Meye. Santley then went back to her classroom, where her students were just beginning to come into the classroom. They told her Niko had just left with his father.

Meanwhile, Joye had returned to Meye's office and written Meye a note stating he was the sole guardian of the children and he was taking them to France. Meye refused to release Niko to Joye, explaining to Joye the import of the court order and advising him she could not release Niko because of the order. Meye realized she would be unable to stop Joye from taking Niko without the use of physical force and therefore let Joye and Niko depart.[3]

---

[2] What exactly transpired at Niko's school on June 15, 1992, was the subject of factual dispute at trial.

[3] Joye testified at his deposition Meye did not try to physically stop him because "that would have been a lot to expect from her. She was a petite woman."

Meye immediately contacted San Marino's district offices. The Cheyoviches were called after Joye and the children had left; however, it is disputed whether the police were called. No one at the school, including respondent Charles Johnson, knew of Joye's plan to take the children that day. Neither Sheryl Goodreau, Jeanne Lipps, Jack R. Rose, Carol Miller nor Gary Richards knew anything about Joye's presence on the school grounds or his actions.

The children are currently in France with Joye. Appellants have been unsuccessful in their attempts to recover their grandchildren through international channels.

Appellants, on behalf of themselves and as guardians on behalf of the minors Daniel and Niko,[4] commenced the within action stating ten causes of action against San Marino and its employees[5] and Joye for (1) abduction, (2) negligence, (3) failure to discharge mandatory duty, (4) conspiracy to abduct children in violation of court order, (5) intentional infliction of emotional distress, (6) negligent infliction of emotional distress, (7) violation of Unruh Civil Rights Act, (8) deprivation of rights under color of state law (42 U.S.C. § 1983), (9) conspiracy for deprivation of constitutional rights (42 U.S.C. §§ 1985, 1988), and (10)

---

[4] The record contains no copy of any order appointing appellants guardians *ad litem* for Daniel and Niko, although the complaint alleges Diana Cheyovich was the lawful guardian of the children by virtue of the temporary guardianship order.

[5] Appellants later voluntarily dismissed seven school district defendants originally named in the first amended complaint. The remaining defendants were respondents Mary A. Meye, Perta Santley, Jeanne Lipps, Sheryl Goodreau, Jack R. Rose, Carol Miller, Charles Johnson and Gary R. Richards.

injunctive relief. Respondents filed a summary judgment motion which disposed of all the causes of action except for breach of mandatory duty, negligent infliction of emotional distress, and negligence.

Shortly thereafter, appellants brought six motions for, among other things, new trial (based on the summary judgment motion), motion to vacate [summary] judgment, motion to recuse district's counsel, motion for sanctions, motion to reopen discovery, and a motion for whatever other relief was required. The motions were denied on the grounds they failed to comply with Superior Court Local Rule 9.3.[6] Appellants then filed four additional motions, including a motion to vacate judgment, to recuse counsel for the district, to amend the complaint, and to reopen discovery. These motions were also denied. (Collectively, these motions are referred to by the parties as the "Ten Motions.")

The matter went to trial before a jury. At the close of appellants' case, respondents moved for nonsuit on the mandatory duty, negligence and negligent infliction of emotional distress claims. The court granted nonsuit as to all defendants on the mandatory duty and negligent infliction of emotional distress claim. Nonsuit was also granted in favor of the remaining defendants except for San Marino, Meye, Santley and Johnson on the negligence cause of action.[7] The court granted nonsuit as to Niko and Daniel on the grounds they had suffered no damages.

---

[6] This rule requests the parties to provide translations of foreign language documents attached as exhibits.

[7] The Order says nothing about the negligence claim, instead stating the motion is denied as to appellants' claim for "damages."

The jury returned a verdict of $1,399,382 in favor of appellants against San Marino, Meye, and Santley. These respondents moved for a new trial and a judgment notwithstanding the verdict. The trial court indicated unless the parties could settle the matter, it would grant the motion for a new trial. While settlement was pending, appellants discharged their counsel. The trial court denied respondents' motion for judgment notwithstanding the verdict without explanation. The trial court granted their motion for a new trial on the grounds of juror misconduct (quotient verdict), excessive damages, and misconduct by counsel (improper closing argument), insufficient evidence of causation, and insufficient evidence of damages. Appellants timely appealed and respondents timely filed a cross-appeal.

DISCUSSION[6]

I. APPELLANTS' DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE TAKING OF THE DEPOSITIONS OF JOYE, NIKO AND DANIEL.

Appellants contend the trial court erred in denying their motion to quash the depositions and for protective

---

[6] Appellants have requested we incorporate all issues and authorities from Appeal No. B 098163, an appeal taken from the denial of appellant's motion for summary judgment, a non-appealable order. To the extent the arguments are not merely duplicates of arguments made in the instant appeal, they are addressed separately in this opinion. We also point out the correct case number of the prior appeal is B098164. Appellants' failure to give this court the correct case number caused this court considerable confusion and inconvenience while the correct documents were located, resulting in a waste of this court's valuable time and resources.

order. Appellants contend respondents were required to follow the Hague Convention and counsel's failure to do so also violated the Rules of Professional Conduct as well as their due process rights. (*Pierburg GmbH & Co. KG* v. *Superior Court* (1982) 137 Cal.App.3d 238, 244-245 [procedures for depositions]; *Henrikson* v. *Great American Savings & Loan* (1982) 111 Cal.App.3d 103, 114 n.5.) Appellants also contends error occurred because the notices of deposition provided the depositions to be videotaped, but in fact they were not and this permitted Joye to "wantonly and arrogantly manipulate . . . the minor appellants' testimonies." Respondents do not challenge this contention in their brief.

We find no error. The Hague Convention is an international treaty which governs the conduct of discovery with foreign citizens in foreign countries. It specifies certain procedures to be followed in obtaining such discovery. (See *Pierburg, GmbH & Co. KG* v. *Superior Court, supra*, at pp. 241-243.) However, appellants have not specified how the particulars of the Hague Convention were not complied with, and we therefore cannot evaluate their arguments on appeal.

In addition, appellants have not demonstrated how they were harmed by the taking of this discovery.[9] First, Joye was an adverse party, so appellants can raise no complaint on his behalf for the taking of his deposition. Second, appellants were apparently never appointed guardians ad litem for Niko and Daniel, and they therefore lack

---

[9] Indeed, appellants' real complaint seems to be the discovery produced factual declarations which were adverse to them.

standing to bring any argument on behalf of Daniel and Niko, who therefore have the status of third parties in this litigation. (Code Civ. Proc. § 372(a); *J.W.* v. *Superior Court* (1993) 17 Cal.App.4th 958, 964-965 [counsel must appear on behalf of minor even though guardian may appear on their own behalf in propria persona].) Finally, appellants have provided no factual basis for their assertions the children's testimony was manipulated in any fashion.

II. RESPONDENTS' SUMMARY JUDGMENT MOTION WAS CORRECTLY GRANTED.

Appellants contend the trial court erred in granting respondents' summary judgment motion on the third, fourth, fifth, seventh, eighth and ninth causes of action for failure to discharge mandatory duty, conspiracy to abduct children in violation of court order, intentional infliction of emotional distress, violation of Unruh Act, violation of civil rights under color of state law, and conspiracy to deprive appellants of their civil rights. Appellants contend they provided facts in support of their opposition which established triable issues of fact existed. Respondents argue the summary judgment motion should also have been granted as to the second and sixth causes of action (denied by the trial court) for negligence and negligent infliction of emotional distress because the school district's employees may only be held liable for their own acts and omissions. We discuss this latter argument in connection with the motion for non-suit and for judgment notwithstanding the verdict, *infra*.

A. The Trial Court Properly Granted Summary Judgment on the Fourth Cause of Action for Conspiracy to Abduct Children.

First, appellants contend respondents' and Joye's depositions established a prima facie case of conspiracy, joint venture, mutuality of agency, common scheme, plan, and concert of actions. Appellants contend although the conspiracy was initially directed at the kidnapping and abduction, the conspiracy is still ongoing, and is now in the "cover-up stage." Appellants contend the existence of such a conspiracy was a fact question for the jury. (See *Wyatt* v. *Union Mortgage Co.* (1979) 24 Cal.3d 773, 784-788.) Appellants further contend in granting the motion the trial court ignored the evidence before it, including evidence of the temporary guardianship order, Diana Cheyovich's request of the teachers and other school employees, as well as the assurances and statements of the school's employees. Appellants contend these unique facts and relationships created a duty on the part of the District to take all steps to protect its students. (*Virginia G.* v. *ABC Unified School District* (1993) 15 Cal.App.4th 1848, 1853.)

Conspiracy requires (1) the formation and operation of the conspiracy, (2) wrongful conduct in furtherance of the conspiracy, and (3) damages. (*Kidron* v. *Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1781.) Conspiracy (i.e., the agreement) is not an independent tort; it is a method of imposing liability on co-tortfeasors for vicarious commission of an underlying tort. (*Applied Equipment Corp.* v. *Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511.)

Appellants apparently contend the school employees had prior knowledge of Joye's plans and aided him in carrying them out. The evidence, however, does not

support this contention. In fact, the evidence establishes conclusively Joye acted alone and only enlisted the aid of the children in carrying out his plan.

B. The Trial Court Properly Granted Summary Judgment on the Fifth Cause of Action for Intentional Infliction of Emotional Distress.

To recover on a claim for intentional infliction of emotional distress, the plaintiff must demonstrate (1) outrageous conduct by the defendant, (2) directed at the plaintiff with the intent of causing extreme emotional distress, (3) causing severe emotional distress to the plaintiff, and (4) plaintiff's severe or extreme emotional distress. (*Trerice* v. *Blue Cross of California* (1989) 209 Cal.App.3d 878, 883.) Outrageous conduct is conduct which exceeds the bounds of that usually tolerated in civilized society. Such conduct must be directed at the plaintiff or occur in the plaintiff's presence. (*Christensen* v. *Superior Court* (1991) 54 Cal.3d 868, 903.) The court may first determine, as a matter of law, whether facts demonstrate outrageous conduct; it is then for the jury to determine whether the defendants' conduct was in fact outrageous. (*Fuentes* v. *Perez* (1977) 66 Cal.App.3d 163, 172.)

Appellants have failed to demonstrate there was either (1) conduct which took place in their presence, and (2) conduct which was extreme and outrageous. Appellants were not present on the school grounds when the "abduction" took place. In addition, the unsuccessful attempts by the school employees to keep Joye from taking the children do not comprise the kind of conduct which is beyond the bounds of that which is tolerated by decent society. Indeed,

the facts demonstrate the school employees (to the extent they were aware of the guardianship order and/or the fact Joye was not to take the children from school) were attempting to prevent Joye from leaving with the children. This is hardly outrageous conduct.

C. The Trial Court Properly Granted Summary Judgment on the Seventh, Eighth, and Ninth Causes of Action for Violation of Appellants' Civil Rights.

Appellants' claims for civil rights violations are based upon their contentions they were discriminated against based upon their national origin. The evidence in support of their contentions consists of excerpts from their depositions. Diana Cheyovich testified at her deposition as follows: "Q. Who at the school district acted towards you in a certain way because of your national origin? . . . Are you saying the school district people didn't comply with the temporary guardian order because of your Serbian background? A. I – I feel they were more for the French than for us. Q. What makes you think that? A. They let the children go knowing they had a legal document in their hand, knowing that I had spent time telling them how vital this was. . . . Q. How would anybody at the district know you were Serbian? A. Oh, come on. It's on our applications, and everything else. I have other children there. . . . Anyone who followed the Bosnian war certainly knew about who's Serbian and who isn't. Come on. They favored Jacky. That's all. They stuck with him regardless . . . " Milan Cheyovich testified: "Q. Do you have any information that anyone at the school district acted in the way that they did in regard to the incident based upon your Serbian background? . . . A. What type of information do you want

Q. Any fact, any ideas, any witnesses, any documents? A. We don't have no witnesses, but that's our personal belief. . . . Q. But you don't have any witnesses or documents to support that? A. No, I don't. . . . Q. Did any one particular incident occur that caused you to form that opinion or contributed to your formation of that idea? A. First of all, my daughter felt that way, the time she went to the school there [to register the children]. And I think that was maybe the main reason we thought that."

1. State Law – Unruh Civil Rights Act.

California Civil Code section 51 provides, in relevant part, "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin [or disability] are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Civil Code section 52 provides damages are recoverable in a civil action against persons who violate section 51. Such an action may be brought against a school because the phrase "business establishment" is interpreted in the broadest sense possible. (See *Nicole M.* v. *Martinez Unified School District* (N.D.Cal. 1997) 964 F.Supp. 1369, 1388.)

Appellants, however, point to nothing specific to support their claims. Indeed, on summary judgment, a defendant may rely on factually devoid discovery responses in sustaining the movant's burden on summary judgment. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 580-581.) Appellants' assertions of second-hand beliefs, based upon their daughter's statements and a generalized belief that people were biased against Bosnians does not support

the kind of intentional discrimination prohibited by Civil Code section 51. (*Harris* v. *Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1152-1154, 1171.)

2. Federal Law – 42 U.S.C. Section 1983 and Sections 1985, 1988.

Appellants have failed to state a claim for conspiracy to violate their civil rights. Under 42 U.S.C. section 1983, a state may not deprive another of their rights under the laws of the United States Constitution. Section 1985 prohibits conspiracy to interfere with civil rights, and section 1988 provides procedural guidelines for prosecution of a section 1983 action. As discussed above, appellants have stated no facts to support a claim of any wrongdoing. Joye testified in his declaration he did not conspire with any of the school officials to abduct Daniel and Niko; the plan was concocted with the boys alone. Respondents, to the extent they are all employees of the same entity, could not conspire with themselves. Thus the claim for conspiracy fails. (*Black* v. *Bank of America* (1994) 30 Cal.App.4th 1, 6; *Hilliard* v. *Ferguson* (5th Cir. 1994) 30 F.3d 649, 653.)

III. APPELLANTS' SUMMARY JUDGMENT MOTION WAS CORRECTLY DENIED.[10]

Appellants moved for summary judgment on the grounds respondents' violation of school administrative

[10] Normally, a plaintiff who is victorious at trial cannot claim error based on the denial of an earlier summary judgment because the error is in effect rendered moot by the trial. (See *Waller* v. *TJD, Inc.* (1993) 12 Cal.App.4th 830, 833 [lack of prejudice to plaintiff precludes review of plaintiff's earlier summary judgment when plaintiff prevails at trial].)

regulations, student release policies, emergency card procedures and registration requirements for school visitors constituted negligence per se. (Evid. Code, § 669(a); Penal Code, § 627, et seq.) Appellants argued the foregoing school regulations, policies and procedures were designed to screen and monitor persons coming on campus to protect the students and school personnel, and also to prevent the unauthorized departure of students from campus. The trial court denied the motion on the grounds (1) Joye was a parent within the meaning of Penal Code section 627.1(a) and therefore the statute did not apply to him, nor was there a causal connection between the failure to register Joye and the harm suffered by appellants, and (2) the district office release procedures were not statutes, ordinances or regulations of a public entity within the meaning of Evidence Code section 669. The trial court also held a triable issue of fact existed "whether or not negligence per se applie[d]" to San Marino's regulations.

Evidence Code section 669 is the statutory enactment of the rule of negligence per se, and provides "(a) The failure of a person to exercise due care is presumed if: [¶] (1) He violated a statute, ordinance, or regulation of a public entity; [¶] (2) The violation proximately caused death or injury to person or property; [¶] (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and [¶] (4) The person suffering the death or injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted." The first two requirements of section 669, subd. (a) are questions of fact; the latter two are questions of law for the court and cannot be the basis of a finding [sic] a triable issue of fact exists. (*Cade* v. *Mid-City Hospital Corp.* (1975)

45 Cal.App.3d 589, 596-597.) Subsection (b) provides: The "presumption [of negligence] may be rebutted by proof that: (1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." Evidence Code section 669.1 provides, in relevant part, a statute or ordinance does not come within section 669 "unless the rule manual, policy, or guideline has been formally adopted."

We find the trial court correctly denied appellants' motion for summary judgment. Appellants have not established they are entitled to the presumption of negligence under Evidence Code section 669(a). Penal Code section 627 is designed to prevent violence on campus and does not address the question of students' release from school to authorized persons; thus, appellants are not within the third requirement of the statute. In addition, any purported violation of Penal Code section 627, et seq., requiring the registration of "outsiders," could not have been a cause of appellants' injuries because Joye did not fall within the definition of an "outsider" and thus a violation of section 627 could not have occurred. We therefore hold appellants have not demonstrated they were entitled to summary judgment in their favor on the basis of negligence per se.

IV. APPELLANTS HAVE NOT ESTABLISHED ANY ERROR WITH REGARD TO THE TEN MOTIONS.

Appellants appeal from denial of their six motions (1) for new trial, (2) to vacate [summary] judgment, (3) to reopen discovery, (4) to disqualify counsel, (5) for sanctions, and (6) for any other relief. Apparently the motion

for "new trial" and to "vacate judgment" were filed in response to the trial court's denial of appellants' motion for summary judgment. The trial court denied the motions on the grounds they did not comply with Local Rule 9.3. The six motions were then re-filed as four motions, to wit: (1) motion to vacate "judgment", (2) motion to reopen discovery, (3) motion to disqualify counsel, and (4) motion to amend the complaint. These motions were also denied.

Appellants' argument in support of reversal of the orders denying these motions consists of, basically, "[t]hese motions should have been granted." However, as an appealed order is presumed to be correct, appellants bear the burden on appeal of demonstrating error. Appellants' argument, which is devoid of legal or factual analysis, does not meet this burden. (See *Marriage of Arceneaux* (1990) 51 Cal.3d 557, 564.)

V. APPELLANTS HAVE NOT ESTABLISHED THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING SANCTIONS TO RESPONDENTS.

Appellants contend the trial court erred in awarding sanctions to respondents. Appellants replaced their counsel shortly before trial, and new counsel attempted to augment appellants' expert witness list. The motion was granted on condition appellants pay all costs of the expert's deposition plus attorneys' fees. Appellants contend the trial court erred in taking off calendar its order to show cause why respondents should not be sanctioned for the failure of their counsel to appear at the first day of trial. They contend this constitutes an abuse of discretion and demonstrates bias on the part of the trial court.

We review the imposition of sanctions for abuse of discretion, and also review for abuse of discretion the trial court's determination of reasonable fees to be paid for deposition of an expert. (*Estate of Ruchti* (1993) 12 Cal.App.4th 1593, 1601; *Marsh v. Mountain Zephyr, Inc.* (1996) 43 Cal.App.4th 289, 303-304.) However, in order to determine whether discretion has been abused, we not only need an adequate record, we need factual and legal support for the claim of error. (*Interinsurance Exchange of the Automobile Club of Southern California v. Collins* (1994) 30 Cal.App.4th 1445, 1448.) Appellants have provided no argument, only conclusory, unsupported statements. We thus find no error.

VI. NONSUIT WAS PROPERLY GRANTED ON THE SECOND AND THIRD CAUSES OF ACTION AND AGAINST DANIEL AND NIKO.

In reviewing a motion for nonsuit, we do not weigh the evidence or consider the credibility of witnesses. Rather, grant of a motion for nonsuit will be upheld on appeal if we determine as a matter of law the evidence presented by plaintiff is insufficient to permit the jury to find in plaintiff's favor. (*Nally v. Grace Community Church of the Valley* (1988) 47 Cal.3d 278, 291.) Appellants contend the order granting respondents' motion for nonsuit failed to determine the "joint venture" issue pursuant to paragraph 31 of the first amended complaint wherein the respondents undertook a "special relationship" by assuring Diana Cheyovich they would honor the guardianship order. Appellants contend there was no basis for dismissing Daniel and Niko from the action on the basis they had failed to establish damages because "[s]uch purported reason was biasedly fallacious[.] Evidence presented by

the [Cheyoviches of their] own damages had [to] carry over to the minor appellants. . . . But more significantly, said minor appellants had a right to recover general damages in and of [themselves] for pain, suffering, mental distress and grieving, etc. . . . "[11]

A. Appellants Have Failed to Produce Facts Sufficient to Support Their Claims for Failure to Discharge Mandatory Duty.[12]

Appellants contend respondents failed to discharge a mandatory duty under, inter alia, Education Code section 32261 [legislative declarations regarding Interagency School Safety Demonstration Act of 1985], Penal Code section 627 [access to school grounds by unauthorized persons], and unspecified statutes and ordinances regarding the release of children to the custody and control of non-designated persons.

Penal Code section 627 et seq., provide [sic] a scheme whereby "outsiders" (persons other than students, their parents or guardians, or authorized personnel of public schools) must register before being allowed onto school

---

[11] Appellants argue the trial court erred in granting nonsuit because, among other things, "Judge Swart's entire outlook of Appellants' claims was one of bias," and "Judge Swart's actions and his rulings were deliberately fashioned and calculated . . . to suppress Appellants from perfecting all of their rightful claims." In the context of determining whether the motion for nonsuit was improperly granted, this is not legal argument and does not merit our attention.

[12] Respondents argue appellants have not made out a case for their negligence claim in the context of the motion for nonsuit; however, the trial court did not grant nonsuit on this claim. Therefore, we do not address those arguments here.

grounds. Reference to Government Code section 815.6 determines whether these statutory provisions imposed a mandatory duty on respondents to bar Joye from the school grounds and ensure he did not leave with Niko. Government Code section 815.6 provides: "Where a public entity is under a mandatory duty imposed by an enactment . . . designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Case law construing this section has developed a three-part test for determining whether liability may be imposed on the public entity: (1) the enactment must impose a mandatory, not a discretionary duty; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting section 815.6 as a basis for liability; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered. (*MacDonald v. State of California* (1991) 230 Cal.App.3d 319, 327.) Whether a particular statute imposes such a duty is a question of law for the court and is based upon a reading of the statutory language and the apparent purposes of the statute. (*Id.*)

The language of Penal Code section 627 et seq., indicates it is designed to ensure the safety of school children and protect them from violent acts by preventing the unauthorized presence of persons on school grounds.[13] The statutory scheme established by section 627 does not

[13] We do not discuss whether the provisions of Education Code section 32261 provide a mandatory duty because legislative declarations are not substantive law.

impose a mandatory duty; rather, it provides guidelines that are to be followed. The governing board of a school district may exempt themselves from the operation of the chapter. (Pen. Code, § 627.9, subd. (a).) In addition, section 627 et seq., are [sic] not directed at parental custody disputes, but the commission of violent crimes on campus by non-students. Indeed, the statute specifically excludes parents *or* guardians from the definition of "outsiders" to whom the statute is applicable. Based on these factors, we conclude there is no mandatory duty arising under Penal Code section 627 et seq., regarding the release of children to their parents; and there being no duty, there can be no breach.

Furthermore, under Government Code section 815.6, liability only attaches where there has not been a reasonable attempt to discharge a mandatory duty. Therefore, even if we were to conclude such a duty existed, the evidence establishes respondents acted reasonably in their attempts to halt Joye's plan to leave school with Niko. When he threatened violence, they were not required to put themselves or other students (including Niko) in danger. Instead, they acted responsibly by calling the district and thus discharged any duty they might have had.

B. Negligent Infliction of Emotional Distress.

Negligent infliction of emotional distress is not an independent tort, but the result of another party's negligence. The cause of action is structured much like a claim for negligence, with elements of duty, breach, causation and damages. (*Marlene F. v. Affiliated Psychiatric Medical Clinic Inc.* (1989) 48 Cal.3d 583, 589.) Damages are

recoverable not based upon a duty theory that arises solely upon foreseeability. Instead, the emotional distress must result from the breach of a duty owed the plaintiff that is either assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a special relationship between the two. (*Id.* at pp. 589-590; see *Bro v. Glaser* (1994) 22 Cal.App.4th 1398 [developing two-prong test consisting of pre-existing relationship and outrageousness of defendant's conduct].) Appellants have failed to demonstrate the elements of a claim for negligent infliction of emotional distress because respondents' conduct was not outrageous, as respondents' response to the situation was not "so extreme as to exceed all bounds of that usually tolerated in a civilized community." (*Bro, supra*, at pp. 1439-1440.)

C. Nonsuit Was Proper as to Niko and Daniel.

With respect to appellants' contentions regarding the dismissal of Daniel and Niko, the right to recover damages is not the same as sufficiency of proof thereon. Appellants' claims of costs incurred by the minors is not supported by the argument the Cheyoviches' own costs had to "carry over" to the children. The claims of mental suffering and anguish are not supported by the children's declarations, in which they both state "I am happy and healthy living with my father in France. I live with my father by choice." Because the record is devoid of any evidence which would persuade us the trial court erred in finding no damages had been incurred by the children, the order granting nonsuit is upheld.

VII. THE TRIAL COURT ERRED IN DENYING RESPONDENTS' MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT.

Respondents contend the trial court erred in denying their motion for judgment notwithstanding the verdict on appellants' claim for damages based on negligence because appellants have failed to establish respondents were negligent under an ordinary standard of care, and appellants have failed to prove respondents accepted a higher duty of care to appellants. (See *Hayem v. Manhattan Beach City School District* (1978) 22 Cal.3d 508, 513.) Respondents contend appellants have failed to prove essential elements of the negligence claim, causation and damages, because appellants cannot establish they would have obtained a different result in the custody proceeding had the children not been abducted.

In reviewing the trial court's denial of a motion for judgment notwithstanding the verdict, we determine whether there is substantial evidence, either contradicted or uncontradicted, supporting the jury's conclusion. If a finding of fact is attacked on the grounds there is no substantial evidence to support it, our inquiry begins and ends with the determination as to whether any substantial evidence supports the finding. When two or more inferences can be drawn from evidence, we do not substitute our deductions for those of the trial court. (*Shapiro v. Prudential Property & Cas. Co.* (1997) 52 Cal.App.4th 722, 730.)

We find the trial court erred because appellants have failed to demonstrate any damages. Appellants presented no evidence at trial to demonstrate they would have been entitled to permanent custody of the two boys. California law states the first preference for child custody is with

both parents or *either parent*. (Fam. Code, § 3040, subd. (a)(1).) California's public policy is to "assure that children have *frequent and continuing contact* with both *parents*." (Fam. Code, § 3020, subd. (b).) These preferences give way only where there is child abuse, neglect, or domestic violence in the home. (Fam. Code, § 3020, subd. (a), (c).) There is no dispute Joye is the boys' father, and thus became presumptively entitled to custody when Joan Cheyovich died. (Fam. Code. § 3040; *Estate of Barassi* (1968) 265 Cal.App.2d 282, 288.)

The evidence shows Joye testified in his deposition, presented as evidence at trial, as follows: In March 1992, after the boys' mother died, Joye discussed with the boys whether they desired to live in the United States with appellants, or return to France and live with him; both boys said they wished to return to France; Joye determined the boys should remain with appellants until June, in order to complete the school year, and allow Joye to arrange for child care in France, Joye advised appellants of these plans, and provided money to appellants to assist in supporting the boys until June. Following their return to France, the boys have lived at all times with Joye. This demonstrates Joye, presumptively entitled to custody, was ready, willing and able to shoulder his responsibilities as the boys' father and custodian, and in fact has done so.

On the other hand, appellants offered no evidence which rebutted the presumption the boys should have been placed in their father's custody. Appellants' brief cites to no competent or admissible evidence of any abuse, neglect, domestic violence, or any other behavior by Joye that would even arguably have warranted a trial court decision overriding the strong presumption in favor of parental custody and justified an award of custody to the

appellant grandparents. The temporary guardianship order of May 8, 1992 does not support an inference appellants would have prevailed in obtaining permanent custody of the boys. The temporary order was an appropriate interim measure – nothing more. Thus, although it is understandable and human that appellant grandparents would strongly wish to retain custody of their dead daughter's children, these natural human feelings do not afford the legal basis for terminating the father's custody rights.

Therefore, because appellants have failed to demonstrate any entitlement to permanent custody, respondents' alleged negligence in permitting Joye to take the boys from school caused appellants no injury which is legally compensable in damages.

Because we conclude respondents are entitled to judgment in their favor on all causes of action of appellants' first amended complaint, we need not consider the argument [sic] the new trial motion was granted in error.

DISPOSITION

The trial court's orders denying the "Ten Motions" and awarding sanctions to respondents are affirmed. The matter is reversed and remanded for the trial court to enter judgment in respondents' favor. Respondents to recover their costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

LILLIE, P.J.

NEAL, J.